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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

MAYA DILLARD SMITH, Individually And On
Behalf Of All Others Similarly Situated,

Plaintiff,

v.

EXAMSOFT WORLDWIDE, INC.,

Defendant.

No.

CLASS ACTION COMPLAINT

DEMAND FOR JURY TRIAL

Judge:

No.

CLASS ACTION COMPLAINT

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1 Plaintiff Maya Dillard Smith, individually and on behalf of all others similarly situated, alleges
2 the following based on information and belief and the investigation of counsel. Plaintiff believes that
3 discovery will uncover substantial additional evidence.

4 I. INTRODUCTION

5 1. Taking a bar exam is one of the most stressful professional rites of passage imaginable.
6 Not only does it mark the final hurdle of law students' transitions from students to lawyers, the bar exam
7 determines whether or not they are even allowed to enter their chosen profession.

8 2. It is not just taking the bar exam, itself, that makes the exam process stressful. Because
9 of the enormous personal and professional consequences of bar exam results, exam takers expend
10 countless hours and enormous sums of money and significant opportunity costs to study and prepare for
11 taking the bar exam, not to mention the three years of law school education – all of which is useless
12 without a coveted state bar number. When exam takers arrive for the bar exam, they are already nervous
13 about how they will perform on the test, wondering what effects this single, fateful test will have on the
14 rest of their lives.

15 3. On the long list of things about which exam takers should be worried, wondering whether
16 they will be able to turn in their exams for grading should be at the very bottom. It is hard to imagine
17 anything more basic in an exam than being able to turn it in for grading.

18 4. Bar exams used to be written by exam takers' own hands with pen on paper. Now a
19 significant portion of bar examinees write and submit their exams electronically. To meet this need,
20 ExamSoft Worldwide, Inc. ("ExamSoft") touts its SoftTest software as a platform that will allow bar
21 examiners to administer bar exams in a more secure way, by shutting down all other programs on a test
22 taker's computer. Examinees taking the exam using SoftTest cannot access the internet, email, or other
23 files on their computers, thus reducing their ability to cheat on the exam. ExamSoft also purports to
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1 make the bar exam more user-friendly, by allowing examinees to use their own computers to take the
2 exam.

3 5. Yet, despite claiming to provide an “easier, more secure, and more reliable way” to take
4 the bar exam, ExamSoft made it impossible for exam takers to turn in their completed bar exams. Bar
5 associations across the country required exam takers who wished to take the test on their computers to
6 buy and use ExamSoft’s “SoftTest” program to take and then turn in the bar exam by uploading it via
7 ExamSoft’s systems. The sole purpose of ExamSoft’s SoftTest is to allow bar exam takers to take and
8 then turn in bar exams to be evaluated.
9

10 6. On July 29, 2014, as exam takers across the country and in California finished their first
11 grueling day of the bar exam, ExamSoft’s SoftTest completely failed to perform its sole function as it
12 made it impossible for exam takers to turn in their completed exams. Rather than studying or relaxing
13 after the first day of the bar in preparation for the next day of the exam, exam takers were up until the
14 early hours of the morning attempting to upload their exams. As one exam taker explained: “Instead of
15 detoxing and preparing for the MBE the following day, I was up until 1:00 a.m. trying and praying for
16 my exam to go through. When I finally did get to bed, I barely got 2 hours rest because I had to be up at
17 5:00 a.m. to start day two of the bar. ExamSoft hasn’t even published an apology. Each student paid
18 \$100 for this nonsense, and I’m sure they made a handsome profit. Quite frankly, it’s disgusting.”¹
19
20

21 7. Not only did ExamSoft’s SoftTest fail to perform its sole function, ExamSoft proved
22 wholly incompetent and ineffectual in addressing the major collapse of its systems. Frantic test takers
23 from across the country were given no information, and then conflicting information, about what they
24 were supposed to do in the face of their inability to upload their exams. As deadlines for uploading the
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28 ¹ <http://abovethelaw.com/2014/07/dear-examsoft-please-give-kids-their-money-back-before-the-internet-murders-you/>

1 exams approached and then lapsed, exam takers were left panicked in the dark as to how to proceed, and
 2 as to whether their work would be lost or deemed too late.

3 8. Not surprisingly, the thousands of exam takers who were unable to upload their exams
 4 were extraordinarily distressed. Far from providing the stress-reducing functionality it advertised,
 5 ExamSoft added an extraordinary burden to an endeavor already fraught with stress and worry. Indeed,
 6 as one exam taker explained, because of ExamSoft's extraordinary failure "we got heartache, stress,
 7 anxiety, and pain...It was an absolute nightmare."²

8 9. Having created the "Biggest Bar Exam Disaster Ever"³, ExamSoft made the situation
 9 even worse by failing to offer any effective customer service or help addressing the disaster it had
 10 created. And, adding insult to injury, ExamSoft offered a worthless "apology," thanked exam takers for
 11 their "forbearance," and then refused to refund any exam takers' money, despite the fact that the product
 12 they had sold to the thousands of exam takers had wholly failed to perform its explicit and sole function.

13 II. JURISDICTION AND VENUE

14 10. With regard to the class action claims, this Court has subject-matter jurisdiction pursuant
 15 to 28 U.S.C. § 1332(d). Plaintiff and more than two-thirds of the putative Class members are citizens of
 16 different States than ExamSoft. Furthermore, the aggregate amount in controversy exceeds \$5,000,000.

17 11. This Court has subject-matter jurisdiction pursuant to 18 U.S.C. § 1332(a). There is
 18 complete diversity of citizenship between Plaintiff and ExamSoft and the amount in controversy exceeds
 19 \$75,000.

20 12. This Court has subject matter jurisdiction over the federal law claims pursuant to 28
 21 U.S.C. §1331. This Court also has supplemental jurisdiction over all other claims in this case pursuant
 22 to 28 U.S.C. § 1367.

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 28 ² *Id.*

³ <http://abovethelaw.com/2014/07/bar-exam-disaster-examsoft-makes-everyones-life-hard/>

III. INTRADISTRICT ASSIGNMENT

IV. PARTIES

17. ExamSoft Worldwide, Inc. is a corporation existing under the law of the State of Florida with its principle place of business located at 6400 Congress Avenue, Suite 1050, Boca Raton, Florida 33487. Defendant regularly conducts business throughout the State of California.

19. According to its website, “ExamSoft was founded in 1998 to give exam takers the convenience of using their own computers to take their exams, while providing administrators the comfort of knowing exam integrity would be maintained. We’re committed to providing the best computer-based testing technology on the market and improving the exam experience for everyone involved.”⁴

⁴ <http://learn.examsoft.com/exam-taker>

20. Forty-two bar associations now require exam takers who wish to take the exam using a computer to purchase and use ExamSoft's SoftTest program to take and then "turn in" the exam, via uploading the completed exam through ExamSoft's systems.

21. Exam takers may either take the bar exam using a pen and paper or spend more than \$100 on ExamSoft's SoftTest for the privilege of using their own computer to take the exam.

22. ExamSoft made explicit representations about the quality and functionality of SoftTest and supporting systems. For example, ExamSoft claims that its software provides an "easier, more secure, and more reliable way" to take the bar exam.⁵ Additionally, ExamSoft also states that using SoftTest will "[t]ake some of the stress and fatigue out of exam day."⁶

23. ExamSoft claims to have industry-leading IT and customer support.

24. Exam Takers who chose to use ExamSoft's SoftTest, did so, in part, in reliance on ExamSoft's claim that its software provides an "easier, more secure, and more reliable way" to take the bar exam.⁷ ExamSoft also promotes itself to exam takers by telling them that using its software will "[t]ake some of the stress and fatigue out of exam day."⁸ In fact, a few weeks before the bar exam, ExamSoft published a "guide" to help students survive "bar exam panic mode."⁹ For exam takers already concerned about the content of the bar exam, it is understandable why such an offer to take eliminate stress from the exam day would be appealing, and would induce exam takers to choose to use ExamSoft.

25. Exam takers who choose to use their computers for the bar exam purchased SoftTest directly from ExamSoft or via their bar associations. The price for each use of SoftTest is approximately \$125 to \$150. Exam takers then install SoftTest directly on their computers. After being

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

1 used to take and upload a bar exam, ExamSoft's SoftTest no longer functions on the purchaser's
2 computer. Exam takers who wish to take another bar exam in the future, either because they fail or wish
3 to establish an additional bar membership, must purchase a brand new copy of ExamSoft's SoftTest.

4 26. When the bar exam begins, ExamSoft's SoftTest provides the bar exam directly to each
5 bar exam taker.

6 27. Once the exam is finished, bar exam takers are instructed to connect their computers to
7 the internet at home or elsewhere, and then upload their completed exams to ExamSoft by specific
8 deadlines, established by each bar association.

9 28. For example, in California, bar exam takers using ExamSoft were required to upload their
10 exams by midnight on July 31.

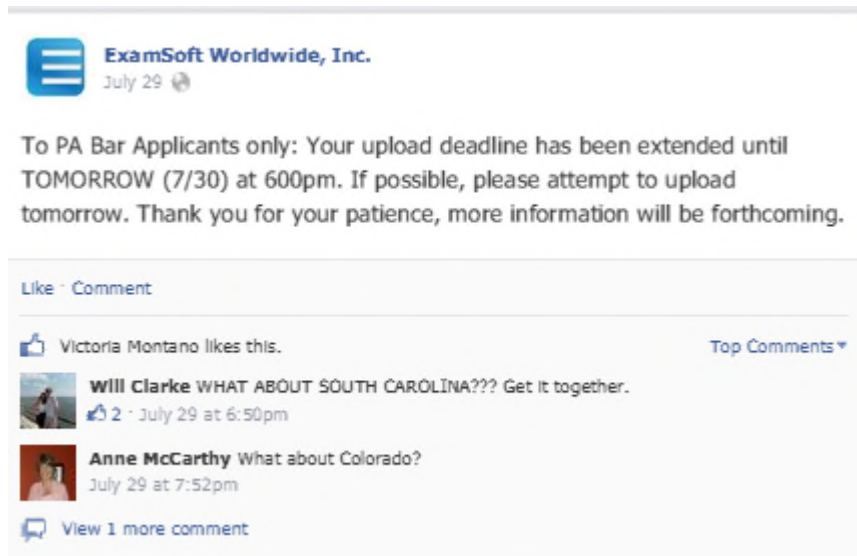
11 29. On July 29, 2014, bar associations in 42 states administered the first day of their
12 examinations for bar membership. Each of these states required the use of ExamSoft's SoftTest for
13 exam takers wishing to use their own computers, rather than a pen and paper.

14 30. At the completion of the first day of the exam, Plaintiff and Class Members left their
15 testing facilities and connected their computers to the internet at home or elsewhere and attempted to
16 upload their exams. Chaos ensued as Plaintiff and Class Members who had just spent a grueling day
17 answering bar exam questions were unable to upload their completed exams to ExamSoft.

18 31. When Plaintiff and Members of the Class sought help from ExamSoft's technical
19 support, they either heard a busy signal or, after finally reaching customer support after hours of calling,
20 were given conflicting, unhelpful, and unsuccessful suggestions on how to solve the problem. ExamSoft
21 told some Members of the Class to "manually" upload the files, which did not solve the problem or
22 allow Class Members to upload their exams. ExamSoft told other Class Members not to worry about the
23 bar associations' deadlines for submission, because it "assured" those Class Members "that this delay in
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uploading your answer files did not impact the answer file content.”¹⁰ This unconvincing “reassurance” did nothing to ameliorate the situation or allow Class Members to put an end to the first day of the bar exams by turning in their exams. To still others Class Members, ExamSoft merely said it was sorry, and then did nothing. In short, despite claiming to have the “industry-leading support you need, when you need it,”¹¹ ExamSoft was wholly unprepared to prevent or address the complete collapse of its product. ExamSoft failed to live up to its representation to Plaintiff and the affected Class Members.

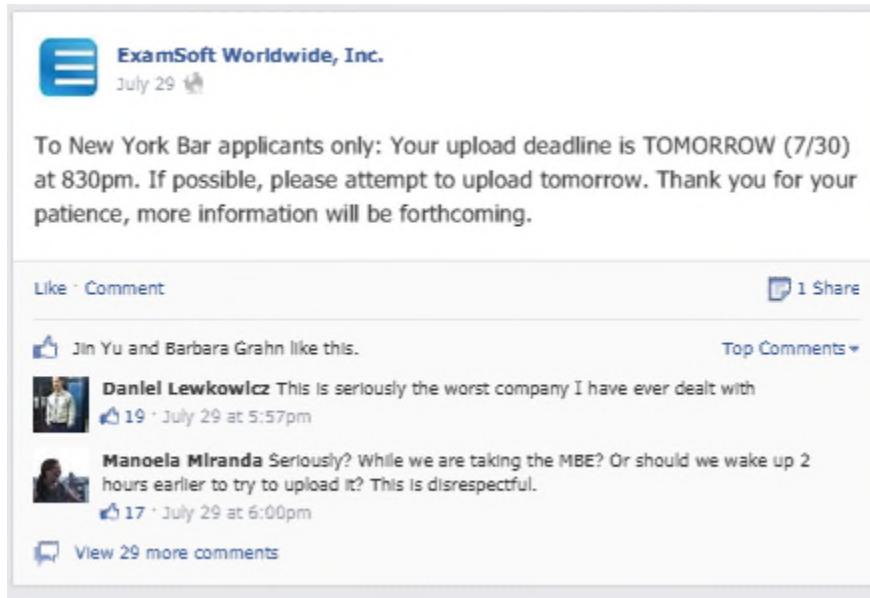
32. Demonstrating just how unprepared ExamSoft was for the ensuing chaos, ExamSoft posted a string of confusing and incomplete notices to examinees on its FaceBook page. Attached as Exhibit A to this Complaint is a print out of ExamSoft’s FaceBook posts during its system meltdown. In post after post ExamSoft tells examinees that various bar associations have moved deadlines as a result of ExamSoft’s system meltdown, but fails to respond to the many questions about states whose deadlines were not moved or about which ExamSoft remained maddeningly silent. The FaceBook post inserted here is typical of ExamSoft’s inability to efficiently or coherently respond to the mess it created.



¹⁰ <http://abovethelaw.com/2014/07/dear-examsoft-please-give-kids-their-money-back-before-the-internet-murders-you/>

¹¹ <http://learn.examsoft.com/flexible-reliable-secure-exam-delivery>

33. As the bar association deadlines for uploading the completed exams approached, and still ExamSoft had not fixed the problems or provided any effective customer support to exam takers, Class Members across the country took to Twitter, Facebook, and other media to vent their anger, confusion, and panic, a selection of which are included below and in exhibits A, B, C & D attached hereto:



34. Regardless of whether or when Class Members were able to upload their exams, they had to return the next day to complete the second day of their bar exams. For many Class Members, ExamSoft's complete failure meant that rather than studying or relaxing after the first day of the exam and preparing for the second, they were frantically attempting to upload their answers, contact

ExamSoft's support, and figure out whether they were going to fail the bar exam because of ExamSoft's product failure.

35. When Class Members demanded a refund from ExamSoft, they were told that "We do not plan on administering any refunds, for we have a very strict no refund policy."¹² ExamSoft has still not refunded Plaintiff's or Class Members' money.

36. In short, ExamSoft was neither an "easier, more secure, and more reliable way" to take the bar exam,¹³ nor did it "[t]ake some of the stress and fatigue out of exam day."¹⁴ Instead, it was wholly unreliable, added enormous amounts of stress to the bar exam, and seriously interfered with Plaintiff's and Class Members' ability to complete their bar exams. ExamSoft's SoftTest wholly failed to perform the sole purpose for which it was advertised and the only task for which Class Members purchased the software.

37. ExamSoft sold Class Members a wholly defective product as it failed to perform its sole task: allowing Class Members to complete and turn in their bar exams. Had Members of the Class known ExamSoft would have failed to allow them to upload their exams by the deadlines, or unreasonably delayed their ability to upload their exams, they would not have chosen to purchase and rely on ExamSoft's SoftTest and supporting systems.

38. On information and belief, ExamSoft had exclusive knowledge of the defect in its software and related systems. These facts are not known to Plaintiff or Class Members. ExamSoft's exclusive knowledge of these material facts gave rise to a duty to disclose such facts, which it failed to perform.

¹² <http://abovethelaw.com/2014/07/dear-examsoft-please-give-kids-their-money-back-before-the-internet-murders-you/>

¹³ <http://learn.examsoft.com/exam-takers>

¹⁴ *Id.*

39. ExamSoft knew and was aware, or should have known and been aware, before marketing and selling its SoftTest software for use in taking and uploading bar exams, that the software and supporting systems were inherently defective and contained significant design defects at the time they were marketed and sold. For example, ExamSoft knew or should have known how many people had purchased SoftTest to take the Summer 2014 bar exams, and thus should have known whether its software and supporting systems could handle receiving and processing that many exams.

40. Indeed, in a letter to law school deans across the country, ExamSoft's own CEO stated, "This week's overall exam volume was almost the same as last year's and lower than other weekly periods for final exams, so the volume itself was not the challenge."¹⁵

41. In response to the ExamSoft meltdown, the Dean of the Northwestern School of Law called on ExamSoft to take responsibility:

[T]here was unquestionably a serious toll taken on the students in their wholly understandable anxiety and worry, perhaps even panic –clearly consequences of the technological problems resulting from your internal systems, just as you note below.

For that reason, it is striking to me that in your boilerplate note [referenced in the paragraph above], there is no indication that you are making any refunds to any bartender. Nor is there any indication that you are planning to make financial recompense that would be a tangible, important acknowledgment of what, at the very least, was a serious problem that resulted from technological problems within the scope of control of ExamSoft.¹⁶

¹⁵ <http://deansblog.law.northwestern.edu/2014/08/05/barmaggedon-and-its-examsoft-aftermath/>

¹⁶ *Id.*

1 42. As a result of ExamSoft's failures and the defects in its software and supporting systems,
2 even when operated as instructed and intended, SoftTest failed to perform its sole function. ExamSoft
3 nonetheless failed to warn its customers of the defects inherent in its software and supporting systems.

4 43. As a result of the defects in ExamSoft's SoftTest and supporting systems, Plaintiff and
5 Class Members purchased a worthless product. As SoftTest failed to allow Class Members to upload
6 their Summer 2014 bar exams – the sole purpose for which Members of the Class purchased SoftTest –
7 it is wholly useless to Class Members. And, for the reasons detailed above, ExamSoft knew or should
8 have known that its misrepresentations and misleading information concerning software and services
9 would significantly inflate the value of the software. Had Plaintiff and Class Members known about the
10 design defects inherent in SoftTest and its supporting systems, they would not have chosen to purchase
11 and use ExamSoft or SoftTest.
12

13 44. ExamSoft has profited, directly and indirectly, by concealing the nature of the defects in
14 its software and supporting systems. ExamSoft has profited from its misrepresentations in numerous
15 ways, including but not limited to, (a) selling its software, (b) selling its software at a premium price;
16 and (c) from entering into contracts with bar associations that require future bar exam takers to purchase
17 ExamSoft software if they wish to use a computer, rather than pen and paper, to take the exam.
18

19 45. Despite the reasonable expectations ExamSoft created in bar exam takers through its
20 marketing of its exam software, ExamSoft has engaged in the following wrongful, but routine, course of
21 conduct, where ExamSoft:
22

23 A. Designed, produced, and sold SoftTest and supporting systems that caused the problems
24 detailed above;

25 B. Failed to disclose that SoftTest and its supporting systems had fundamental flaws that
26 caused the problems described above;
27
28

1 C. Continued to represent explicitly or implicitly that the software Plaintiff and Class
2 Members purchased was dependable and would function properly on the one day on which Plaintiff and
3 Class Members could or would use the software and supporting systems, when it knew or should have
4 known these statements and representations were false;

5 D. Continued to distribute, and sell SoftTest to consumers when it knew or should have
6 known the software and supporting systems were not dependable and would suffer the problems
7 described above under normal usage and operation;

8 E. Failed to disclose to consumers that the defects would, or the substantial risk that these
9 defects could, result in the problems described above;

10 F. Failed to disclose the nature of the defects to consumers;

11 G. Failed to have any contingency plan in place to prevent or at least address SoftTest's and
12 ExamSoft's supporting systems failures in an efficient and effective manner;

13 H. Failed to disclose to consumers that ExamSoft is not committed ensuring it has adequate
14 support staff or IT personnel to deal with software and system failures in a reasonable, effective, and
15 efficient way;

16 I. Failed to take action to correct its omissions or false or misleading express
17 representations about the use, efficacy, qualities, and benefits of its SoftTest software and supporting
18 systems; and

19 J. Failed to disclose that despite following all instructions, consumers would still suffer the
20 problems described above.

21 46. By engaging in the foregoing course of conduct, ExamSoft has caused consumers—
22 including Plaintiff and Class Members—to be aggrieved and suffer ascertainable losses, in that, among
23 other things, ExamSoft's conduct systematically:

24 A. Caused Plaintiff and Class members to pay for a defective and/or worthless product;

1 B. Rendered the SoftTest software useless to Plaintiff and Class members, as it failed to
2 perform its sole function;

3 C. Caused reasonable consumers like Plaintiff and Class members to spend critical time
4 attempting to make ExamSoft's software and systems operate properly, rather than preparing for the
5 second day of their bar exams;

6 D. Caused reasonable consumers like Plaintiff and Class members to suffer real and
7 profound emotion distress that affected their ability to prepare for and take the second and third days of
8 the California Bar Exam.
9

10 47. All jurisdictional prerequisites have been and/or are hereby satisfied by and through the
11 filing and service of this Complaint. Moreover, in light of the overwhelming number of complaints bar
12 exam takers have made directly to ExamSoft, bar associations, and on social media and other internet
13 fora, and ExamSoft's refusal to resolve the problems described above effectively or refund money to
14 Plaintiff and Class Members, any additional pre-suit notice or complaints to ExamSoft would have been
15 futile.
16

17 **Plaintiff Maya Dillard-Smith's Experience At The 2014 California Bar Exam Using ExamSoft**

18 48. Ms. Smith graduated from University of California, Hastings School of Law, in San
19 Francisco, California in May 2014.
20

21 49. Ms. Smith has spent much of her professional career working in and around the legal
22 profession. Ms. Smith is a two-term, senate-appointed member of the California Commission on
23 Judicial Performance, where she chairs the Rules Committee. She worked for the Ninth Circuit and the
24 California Supreme Court. She also served as senior advisor to the Mayor of San Francisco and Director
25 of Violence Prevention for the City and County of San Francisco from 2007 to 2009. After spending
26 over 12 years being a leader in state and local government, she decided to become a lawyer in order to
27 increase her ability to advocate on behalf of others.
28

1 50. To say that Ms. Smith has a lot riding on the outcome of the bar exam is a gross
2 understatement.

3 51. Ms. Smith decided to use her computer to take the bar exam for several reasons,
4 including ExamSoft's claims that it would make taking the bar exam "more reliable" and "less
5 stressful."

6 52. Ms. Smith commenced the bar exam on July 29, 2014, and after finishing a full and
7 grueling day of writing essays, she, along with her fellow exam takers, was told to leave the testing
8 facility and find a place at which she could connect her computer to the internet, and then upload her
9 exam to ExamSoft.
10

11 53. When Ms. Smith left the testing facility, she went to home and connected her computer to
12 the internet. She then attempted to upload her exam to ExamSoft. She was unable to do so. Instead of
13 accepting her bar exam, ExamSoft's website continually returned an error message to Ms. Smith, telling
14 her that her essays would not upload. This was not only frustrating but worrisome. It was unclear if the
15 problem was that SoftTest had failed to save her essays properly, or if the problem lay with ExamSoft's
16 support systems and servers.
17

18 54. After finding herself unable to upload her essays, Ms. Smith looked online to see if others
19 were experiencing similar problems. It was then she discovered that ExamSoft was in the midst of a
20 nation-wide failure.
21

22 55. While Ms. Smith found some modest consolation knowing that thousands of others were
23 in the same boat with her, she was nevertheless outraged by ExamSoft's failure to provide a product and
24 supporting systems that operated as advertised, particularly on this day, one of the most stressful and
25 important of her life. To add injury to injury, Ms. Smith had paid nearly \$150 for the privilege of using
26 SoftTest.
27
28

1 56. After attempting to upload her essays one more time, Ms. Smith decided she would wait
2 and focus on preparing for the second day of her exam, hoping that SoftTest and her computer would
3 properly store her essays until then.

4 57. Ms. Smith was finally able to upload her July 29 essays on July 30th.

5 58. After uploading her essays on July 30, Ms. Smith thought her troubles with ExamSoft
6 were over. She could not have been more incorrect.

7 59. On July 31, during the third day of the bar exam, Ms. Smith was again using ExamSoft's
8 SoftTest to type answers to her essays. To her horror, SoftTest suddenly began deleting her words, one
9 after the other, until it had erased over 1500 words of her essay.

10 60. As her fellow bar examinees around her and multiple proctors witnessed, Ms. Smith
11 attempted to stop the program from deleting her essay, but could do nothing to stop it.

12 61. It was as if Pac Man had been unleashed on her exam, eating each word, one after the
13 next, slowly consuming the answers for which she had spent years preparing to write.

14 62. After deleting more than 1500 words of her essay, SoftTest then popped up a window
15 which asked if she was sure she wanted to delete these words. Ms. Smith repeatedly pressed the "no"
16 button, but the same window would then pop back up, asking her if she was sure she wanted to delete
17 the material. At this point, the software was essentially frozen, and Ms. Smith had no essay and a non-
18 functioning computer.

19 63. SoftTest purports to save backup copies of all essays routinely. As a result, Ms. Smith
20 attempted to prevent SoftTest from saving a copy of the deleted file. She was unable to do so, and
21 SoftTest would not let her open any earlier-saved version.

22 64. ExamSoft had no technical support on site to deal with SoftTest's failure.

23 65. As Ms. Smith sat at her desk, staring at her blank SoftTest screen, a proctor handed her a
24 stack of paper and a pen, and told her that she had better start writing.

1 66. Ms. Smith is a remarkably strong and collected person. In the time remaining, she took
2 her pen and paper and furiously recreated her now-deleted answers, in outline form, in an attempt to
3 capture as many points as she could.

4 67. When the morning essay session ended, the exam takers who witnessed Ms. Smith's
5 ordeal approached her to tell her their disbelief at what happened, and how shocked they were that Ms.
6 Smith was able to remain as cool as she did under the extraordinary pressure.

7 68. It was then, outside of the heat of the battle, that Ms. Smith lost her composure. She was
8 overwhelmed with feelings of anger that someone else's error might cost her admission to the California
9 bar. She was furious that after having spent so much of her life preparing for this moment, she could be
10 denied her goal because of a software defect that ate her bar exam. And she was miserable at the
11 thought that she would have to take the bar exam again.

12 69. Somehow, Ms. Smith gathered her thoughts together over the lunch break, and taking her
13 trusty pen in her hand, she spent the remainder of the day finishing her essays.

14 70. As the day ended, unlike the first day of the bar exam, Ms. Smith was able to hand in a
15 stack of paper with her answers firmly written down in ink.

16 71. Because there was no ExamSoft technical support onsite, California Bar Association staff
17 told her that she had to contact ExamSoft to retrieve any saved information on SoftTest.

18 72. Because Ms. Smith knew the final saved version of her essays written on SoftTest were
19 missing more than 1500 words, she did not attempt to upload the answer to ExamSoft.

20 73. Yet in an ironic and terrifying twist, when Ms. Smith finally connected her computer to
21 the internet three days later, SoftTest inexplicably connected to the ExamSoft servers and uploaded her
22 essay that was missing the 1500 plus words.

23 74. Ms. Smith contacted ExamSoft on July 31, during the lunch break immediately following
24 the loss of her essay. She spoke with ExamSoft employee Adam Katz, who told Ms. Smith to call back
25

1 at the end of the day to find a solution. Ms. Smith did not speak with Mr. Katz, however, until the
2 following day.

3 75. Ms. Smith explained to Mr. Katz the situation and how SoftTest had eaten her exam. Mr.
4 Katz explained to Ms. Smith that there might be earlier versions of her essay that could be retrieved.
5 Ms. Smith asked that ExamSoft attempt to retrieve these files, but was told they would not do so.
6

7 76. Finally, ExamSoft put Ms. Smith in touch with Erin Washburn, ExamSoft's Software
8 Operations Manager. On the phone, she told Ms. Smith that while SoftTest does save multiple versions
9 of the essays, ExamSoft would not release whatever versions it might have. ExamSoft claimed its
10 "policies" prevented them from making such earlier version available to the examinee. Ms. Washburn
11 reiterated this policy in an email, in which she wrote:

12
13 ExamSoft will not open any working exam files or final answer files without a direct request
14 from an authorized representative of the State Bar of California. As you have stated to several
15 ExamSoft representatives, you believe that content may be missing from the final answer file and
16 you would therefore like to upload an earlier version of the exam file. In order to determine
17 which file contains the content that you wish to upload we would need to open the encrypted
18 files on your computer and allow you to view the answer content to then direct us on which file
19 to upload. As I stated on the phone this is against our policy.

20 77. Ms. Smith was confounded. Why would ExamSoft save prior versions of her exam if it
21 would not release those answers?

22 78. Determined to salvage what might remain of her essays, Ms. Smith contacted the
23 California Bar Association, and after explaining her situation was told that there are thousands of other
24 people in California who took the bar exam, many of whom also had problems with SoftTest, and so she
25 would simply have to wait until the Bar was able to get to her problem, and work it out with ExamSoft.

26 79. Today, Ms. Smith has no idea whether the essays she wrote on the third day of the exam
27 exist, and if they do, what they might contain. She has no idea if she may fail to pass the bar exam
28 because of ExamSoft's extraordinary failure.

1 80. She does know that ExamSoft's product, product support, and ability to address failures
2 are wholly inadequate, and made her bar exam taking experience an absolute nightmare.

3 81. ExamSoft – by its complete failure to provide adequate software, supporting systems, and
4 customer service – caused Ms. Smith and her fellow bar examinees extraordinary, wholly unnecessary,
5 and avoidable stress and considerable emotional distress.
6

7 VI. CLASS ACTION ALLEGATIONS

8 82. This matter is brought by Plaintiff on behalf of herself and those similarly situated, under
9 Federal Rules of Civil Procedure 23(b)(2) and 23(b)(3).

10 83. The Class that Plaintiff seeks to represent is defined as follows:

11 All persons who purchased or employed ExamSoft's SoftTest for use in the Summer 2014 bar
12 exam.

13 84. The Subclass that Plaintiff seeks to represent is defined as follows:

14 All persons within the State of California who purchased or employed ExamSoft's SoftTest for
15 use in the California Summer 2014 bar exam.
16

17 85. Unless specifically noted below, Plaintiff brings all claims on behalf of the Class.

18 86. **Numerosity/Impracticability of Joinder:** The members of the Class are so numerous
19 that joinder of all members would be impractical. The proposed Class likely contains thousands of
20 members. The precise numbers of members can be ascertained through discovery, which will include
21 ExamSoft's sale and other records.
22

23 87. **Commonality and Predominance:** There are common questions of law and fact that
24 predominate over any questions affecting only individual members of the Class.

25 88. For Plaintiff and the Class, the common legal and factual questions include, but are not
26 limited to the following:
27
28

1 A. Whether ExamSoft's SoftTest and supporting systems are materially defective and what
2 are the defects;

3 B. Whether ExamSoft knew, or should have known, that SoftTest and supporting systems
4 were and are materially defective;

5 C. Whether ExamSoft omitted and concealed material facts from its communications and
6 disclosures to Plaintiff and the Class regarding the defects inherent in the software and supporting
7 systems;

8 D. Whether ExamSoft has engaged in unfair methods of competition, unconscionable acts or
9 practices, and unfair or deceptive acts or practices with the sale of its software;

10 E. Whether ExamSoft violated California and/or other consumer protection statutes;

11 F. Whether ExamSoft has been unjustly enriched;

12 G. Whether, as a result of ExamSoft's conduct, Plaintiff and the Classes have suffered
13 damages; and if so, the appropriate amount thereof; and

14 H. Whether as a result of ExamSoft's misconduct, Plaintiff and the Class are entitled to
15 equitable and declaratory relief, and, if so, the nature of such relief.

16 89. **Typicality:** The representative Plaintiff's claims are typical of the claims of the members
17 of the Class. Plaintiff and all the members of the Class have been injured by the same wrongful practice
18 of ExamSoft. Plaintiff's claims arise from the same practices and course of conduct that give rise to the
19 claims of the members of the Class and are based on the same legal theories.

20 90. **Adequacy:** Plaintiff is a representative who will fully and adequately assert and protect
21 the interests of the Class, and has retained class counsel who are experienced and qualified in
22 prosecuting class actions. Neither Plaintiff nor her attorneys have any interests contrary to or in conflict
23 with the Class.

91. **Superiority:** A class action is superior to all other available methods for the fair and efficient adjudication of this lawsuit, because individual litigation of the claims of all members of the Class is economically unfeasible and procedurally impracticable. While the aggregate damages sustained by the Class are likely in the millions of dollars, the individual damages incurred by each Class member are too small to warrant the expense of individual suits. The likelihood of individual Class members prosecuting their own separate claims is remote, and even if every member of the Class could afford individual litigation, the court system would be unduly burdened by individual litigation of such cases. Further, individual members of the Class do not have a significant interest in individually controlling the prosecution of separate actions, and individualized litigation would also result in varying, inconsistent, or contradictory judgments and would magnify the delay and expense to all of the parties and the court system because of multiple trials of the same factual and legal issues. Plaintiff knows of no difficulty to be encountered in the management of this action that would preclude its maintenance as a class action. In addition, ExamSoft has acted or refused to act on grounds generally applicable to the Class and, as such, final injunctive relief or corresponding declaratory relief with regard to the members of the Class as a whole is appropriate.

92. Plaintiff does not anticipate any difficulty in the management of this litigation.

93. ExamSoft has, or has access to, address and/or other contact information for the Members of the Class, which may be used for the purpose of providing notice of the pendency of this action.

VII. CAUSES OF ACTION

FIRST CAUSE OF ACTION

Asserted on Behalf of Plaintiff and the Class

Magnuson – Moss Act (15 U.S.C. §§ 2301, *et seq.*)—Implied Warranty

94. Plaintiff hereby incorporates by reference the allegations contained in all preceding paragraphs of this Complaint as though set forth fully herein.

1 95. Plaintiff asserts this cause of action on behalf of themselves and the other members of the
2 Class.

3 96. This Court has jurisdiction to decide claims brought under 15 U.S.C. § 2301 by virtue of
4 28 U.S.C. § 2301(3).

5 97. ExamSoft's SoftTest software is a "consumer product," as that term is defined in 15
6 U.S.C. § 2301(1).

7 98. Plaintiff and Class Members are "consumers," as that term is defined in 15 U.S.C. §
8 2301(3).

9 99. ExamSoft is a "warrantor" and "supplier" as those terms are defined in 15 U.S.C. §
10 2301(4) and (5).

11 100. 15 U.S.C. § 2310(d)(1) provides a cause of action for any consumer who is damaged by
12 the failure of a warrantor to comply with an implied warranty.

13 101. ExamSoft provided Plaintiff and Class Members with "implied warranties," as that term
14 is defined in 15 U.S.C. § 2301(7).

15 102. ExamSoft has breached these implied warranties as described in more detail above.
16 Without limitation, ExamSoft's SoftTest and supporting systems are defective, as described above,
17 which resulted in the problems and failures also described above.

18 103. By ExamSoft's conduct as described herein, including ExamSoft's knowledge of the
19 defects inherent in the software and supporting systems and its action, and inaction, in the face of the
20 knowledge, ExamSoft has failed to comply with its obligations under its written and implied promises,
21 warranties, and representations.

22 104. In its capacity as a warrantor, and by the conduct described herein, any attempts by
23 ExamSoft to limit the implied warranties in a manner that would exclude coverage of the defective
24

software and systems is unconscionable and any such effort to disclaim, or otherwise limit, liability for the defective the software and supporting systems is null and void.

105. All jurisdictional prerequisites have been satisfied.

106. Plaintiff and members of the Class are in privity with ExamSoft in that they purchased the software directly from ExamSoft.

107. As a result of ExamSoft's breach of implied warranties, Plaintiff and the Class members are entitled to revoke their acceptance of the software, obtain damages and equitable relief, and obtain costs pursuant to 15 U.S.C. § 2310.

SECOND CAUSE OF ACTION
Asserted on Behalf of Plaintiff and the Subclass
Violations of California's Consumers Legal Remedy Act, Cal. Civ. Code §§ 1750, *et seq.*

108. Plaintiff, a resident of California, incorporates by reference each and every prior and subsequent allegation of this Complaint as if fully restated here.

109. California's Consumer Legal Remedies Act, Cal. Civ. Code §§ 1750, *et seq.* makes it unlawful to engage in unfair methods of competition and unfair or deceptive acts or practices intended to result, or which results, in the sale or lease of goods or services to any consumer.

110. Plaintiff and the Subclass were, and continue to be, at all times material to the Complaint, "consumers" and "persons" as defined by the Cal. Civ. Code § 1761. Plaintiff, as well as the Subclass, purchased and/or paid for ExamSoft for personal and/or family and/or household use.

111. As alleged throughout this Complaint, ExamSoft engaged in unfair, deceptive, and/or unlawful marketing in violation of Civ. Code § 1770(a) by representing to the Subclass that SoftTest was an "easier, more secure, and more reliable" way to take the bar exam.¹⁷ ExamSoft made uniform representations that its SoftTest was of a particular standard, quality, or grade when it was not, and, as

¹⁷ <http://learn.examsoft.com/exam-takers>

1 set forth above, made unfair, deceptive, and/or unlawful statements regarding the capacity and
2 characteristics of SoftTest.

3 112. Specifically, ExamSoft has violated the following proscribed practices pursuant to Cal.
4 Civ. Code § 1770(a) with the purpose of inducing Plaintiff and the Subclass to purchase and/or use
5 ExamSoft:
6

7 113. § 1770(a)(5): ExamSoft represented to Plaintiff and the Subclass that its product had
8 characteristics, uses, or benefits that it does not have. Specifically, ExamSoft represented to Plaintiff
9 and the Subclass that its SoftTest software and its supporting technology works and would allow them to
10 upload their bar exams in a reasonably and timely manner. ExamSoft concealed and/or failed to
11 disclose that SoftTest and its supporting systems have a design and/or capacity defect and that the
12 defects had the capacity to, and did in fact, prevent Plaintiff and the Subclass from uploading their bar
13 exams in a reasonable and timely manner.
14

15 114. § 1770(a)(7): ExamSoft represented to Plaintiff and the Subclass that SoftTest was of a
16 particular standard, quality, or grade when it was of another. In this regard, ExamSoft represented that
17 SoftTest and its associated technology was reliable when, in fact, the technology failed to allow Plaintiff
18 and the Subclass to timely and reasonably upload their bar exams.
19

20 115. ExamSoft's concealment and misrepresentations regarding the reliability and attributes of
21 SoftTest and its associated technology was a material omission/misstatement that would cause a
22 consumer to believe, incorrectly, that the ExamSoft technology would function in a timely and
23 reasonable manner.

24 116. Plaintiff was exposed to and/or relied upon ExamSoft's unfair, deceptive, and/or
25 unlawful marketing practices. The Subclass was uniformly exposed to ExamSoft's material
26 omissions/misstatements regarding the supposed benefits of ExamSoft and whether the ExamSoft
27 technology would function in a timely and reasonable manner.
28

1 117. Plaintiff and the Subclass lost money and incurred significant, unreasonable stress as a
2 result of ExamSoft's unfair, deceptive, and/or unlawful marketing practices pursuant to Cal. Civ. Code §
3 1770(a), through the purchase of SoftTest that was unlawfully advertised and marketed in violation of
4 Cal. Civ. Code § 1770(a).

5 118. The conduct described herein by ExamSoft is continuing. Plaintiff will promptly demand
6 the conduct cease in a Consumer Legal Remedies Act letter. The conduct was done for profit as a
7 deliberate corporate policy rather than an isolated incident, and was morally wrong, callous, and/or
8 oppressive.

9 119. As a result of ExamSoft's violations of the California's Consumer Legal Remedies Act,
10 Plaintiff seeks an order of this Court permanently enjoining ExamSoft from perpetrating its unfair,
11 deceptive, and/or unlawful marketing practices. If ExamSoft does not take action to cease its unfair,
12 deceptive, and/or unlawful marketing practices within thirty (30) days of being served with her notice
13 letter, Plaintiff will seek leave to amend this Complaint to request, in addition to an order enjoining
14 ExamSoft from continuing its unfair, deceptive, and/or unlawful practices, an order awarding, *inter alia*,
15 Plaintiff and the Subclass actual damages, restitution, attorneys' fees and costs, and for such other relief
16 as set forth below.

17 120. Plaintiff reserves the right to amend this Complaint to seek punitive damages.

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19
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21 **THIRD CAUSE OF ACTION**
22 **Asserted on Behalf of Plaintiff and the Subclass**
23 **Violations of California's Unfair Competition Law Cal. Bus. & Prof. Code §§ 17200, *et seq.***

24 121. Plaintiff incorporates by reference each and every prior and subsequent allegation of this
25 Complaint as if fully restated here.

26 122. California's Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, *et seq.*, protects
27 both consumers and competitors by promoting fair competition in commercial markets for goods and
28 services. California's Unfair Competition Law is interpreted broadly and provides a cause of action for

1 any unlawful, unfair, or fraudulent business act or practice. Any unlawful, unfair, or fraudulent business
2 practice that causes injury to consumers falls within the ambit of California's Unfair Competition Law.

3 123. ExamSoft engaged in substantial advertising and marketing of its ExamSoft product and
4 associated services within the State of California.

5 124. Because of ExamSoft's unlawful and unfair business practices, Plaintiff and the
6 California Subclass were misled into purchasing and/or using ExamSoft's SoftTest product on the
7 California Bar Exam. Plaintiff relied, to her detriment, on ExamSoft's false representations, detailed
8 above, that ExamSoft would perform reliably as represented when it did not. The California Subclass
9 was uniformly exposed to ExamSoft's unlawful and unfair business practices.
10

11 **FOURTH CAUSE OF ACTION**
12 **Asserted on Behalf of Plaintiff and the Class**
13 **Breach of Contract**

14 125. Plaintiff repeats and realleges each and every allegation contained above as if it were
15 fully set forth herein.

16 126. In order to purchase and use SoftTest, Plaintiff and the Class had to entered into a
17 contract with Defendant, whereby they would pay Defendant money and Defendant agreed to provide
18 software and related support systems that would allow for the reliable and timely uploading of bar exam
19 answers.
20

21 127. Defendant materially breached this contract by failing to provide a product that reliably
22 and timely uploaded Plaintiff's and the Class's bar exams. Plaintiff and the Class fully performed their
23 portion of the contract by paying Defendant the listed sale price for SoftTest.

24 128. As a direct and proximate result of Defendant's misconduct and breach of contract,
25 Plaintiff and the Class suffered harm in the form of monies paid. Plaintiff and the Class did not receive
26 the benefit of the bargain for which they contracted and paid money.
27
28

FIFTH CAUSE OF ACTION
Asserted on Behalf of Plaintiff and the Class
Negligence

129. Plaintiff repeats and realleges each and every allegation contained above as if it were fully set forth herein.

130. Plaintiff and the Class paid Defendant to use its product to take the California bar exam and timely upload their exams for evaluation.

131. By accepting payment from Plaintiff and the Class, Defendant assumed a duty to operate its product and supporting systems in a commercially reasonable manner with sufficient security, reliability, and capacity to handle the foreseeable demand and use of SoftTest and related support systems.

132. Defendant failed to maintain and operate its systems in a manner sufficient to provide Plaintiff and the Class the ability to upload their exams in a timely and reliable manner as promised. Instead, Defendant's software and supporting systems were wholly insufficient to handle the advertised use of the software and supporting systems. Despite knowing precisely how many people would be using SoftTest and the supporting systems for bar exams across the country on the same day, Defendant did not have the capacity to deal with the known and expected use of its software and support systems.

133. By failing to operate and maintain its systems as described above, Defendant's conduct was negligent and departed from all reasonable standards of care.

134. As a direct and proximate result of Defendant's failure to exercise reasonable care and sufficiently operate and maintain its software and supporting systems, Defendant could not handle Plaintiff and the Class's attempts to upload their bar exams and thereby failed to follow through on its representations and promises to timely and reliably upload exams.

135. Defendant's failure was reasonably foreseeable in that Defendant was fully aware of how many people would be using ExamSoft's software and supporting systems to take and then upload bar

1 exams across the country on the same day, because Plaintiff and the Class had purchased and registered
2 SoftTest well in advance of the day of the exam.

3 136. Neither Plaintiff nor the Class contributed to Defendant's failures.

4 137. As a direct and proximate result of Defendant's negligence described above, Plaintiff and
5 the Class were injured because they suffered a critical and substantial failure in their functional use of
6 Defendant's product and support systems for which they paid substantial sums of money, and suffered
7 stress, anxiety, and emotional distress.
8

9 **SIXTH CAUSE OF ACTION**
10 **Asserted on Behalf of Plaintiff and the Class**
11 **Negligent Misrepresentation**

12 138. Plaintiff repeats and realleges each and every allegation contained above as if it were
13 fully set forth herein.

14 139. Defendant made misrepresentations of material fact when it represented that its exam-
15 taking software, SoftTest, and its attendant support programs would allow Plaintiff and the Class
16 Members to easily upload their exam answers, thereby reducing the already considerable stress
17 associated with taking the bar exam.

18 140. Upon information and belief, Defendant had no reasonable grounds for believing that
19 representation to be true, as it alone knew its software and supporting systems were incapable of
20 operating as represented. Defendant knew exactly how many exam takers would be uploading exam
21 answers at the end of each day of the Summer 2014 exam, and thus knew or should have known whether
22 its software and supporting systems would or could operate as represented.
23

24 141. Defendant, as alleged above, made that representation with intent to induce Plaintiff's
25 and the Class Members' reliance on the fact misrepresented, by convincing them that by spending up to
26 \$150 on SoftTest they would relieve some of the stress attendant with taking the bar exam.
27
28

142. Because only Defendant knew exactly how many exam takers planned to upload answers following the Summer 2014 exam, Plaintiff and the Class Members were ignorant of the truth regarding SoftTest and justifiably relied on Defendant's misrepresentations.

143. As a result of Defendant's misrepresentation and Plaintiff and Class Members' justifiable reliance on it, Plaintiff and Class Members have suffered damages: they endured the historic failure of Defendant's product and support systems for which they paid substantial sums of money, and suffered stress, anxiety, and emotional distress.

SEVENTH CAUSE OF ACTION
Asserted on Behalf of Plaintiff Only
Negligence

144. Plaintiff incorporates by reference each and every prior and subsequent allegation of this Complaint as if fully restated here.

145. Plaintiff brings a cause of action for negligence against ExamSoft.

146. ExamSoft has a duty to exercise reasonable care in the design, formulation, manufacture, sale, promotion, supply and/or distribution of the SoftTest product and associated technology, including the duty to assure the product is as functional as it is promoted.

147. ExamSoft was negligent in the design, manufacture, testing, advertising, marketing, promoting, supply, and sale of SoftTest in that it:

- A. Misled Plaintiff by suggesting that ExamSoft would function in a reasonable and timely manner;
- B. Negligently designed ExamSoft in a way that it knew or should have known would fail when used as intended to upload bar exams by thousands of users;
- C. Recklessly, falsely, and/or deceptively represented or knowingly omitted, suppressed, or concealed material facts regarding the functionality of SoftTest, including the fact that it could literally eat Plaintiff's words as she wrote her bar exam;

D. Was otherwise careless, negligence, grossly negligent, reckless, and acted with willful and wanton disregard for Plaintiff's rights and well-being.

148. Despite the fact that ExamSoft knew or should have known that SoftTest had the ability to malfunction on a massive scale, ExamSoft continued to market and sell SoftTest to consumers, including Plaintiff. ExamSoft knew that SoftTest users, including Plaintiff, would suffer reasonably foreseeable injuries, including emotional distress and unreasonable stress both during the exam and in its aftermath, as a result of its failure to exercise reasonable care.

149. Had ExamSoft told Plaintiff it sold a dysfunctional product and technology, Plaintiff would never have purchased ExamSoft, would not have suffered emotional distress and unreasonable stress both during the exam and in its aftermath.

150. As a direct and proximate result of ExamSoft's negligence, misrepresentations, and recklessness, Plaintiff has suffered significant damages. Accordingly, Plaintiff seeks an order of this Court:

- A. Awarding Plaintiff compensatory damages;
- B. Awarding Plaintiff all appropriate damages for the injury she sustained while suffering from SoftTest's failure to function including, *inter alia*, pain and suffering, emotional distress, anguish, shock, stress, and mental suffering;
- C. Imposing exemplary / punitive damages against ExamSoft;
- D. Awarding costs and reasonable attorneys' fees; and
- E. Providing for such other relief as set forth below.

EIGHTH CAUSE OF ACTION
Asserted on Behalf of Plaintiff Only
Negligent Misrepresentation

151. Plaintiff repeats and realleges each and every allegation contained above as if it were fully set forth herein.

152. Defendant made misrepresentations of material fact when it represented that its exam-taking software, SoftTest, and its attendant support programs would allow Plaintiff to type her exam answers without losing her work and to easily upload her responses, thereby reducing the already considerable stress associated with taking the bar exam.

153. Upon information and belief, Defendant had no reasonable grounds for believing those representations to be true as it alone knew that its software suffered from fundamental flaws, exposing users to the likelihood of losing their work. Similarly only Defendant knew the flaws in its software and support systems and exactly how many exam takers would be uploading exam answers at the end of each day of the Summer 2014 exam, including Plaintiff.

154. As alleged above, Defendant made its representations with intent to induce Plaintiff's reliance on the facts misrepresented, by convincing Plaintiff that by spending approximately \$100 on SoftTest so that she would relieve some of the stress attendant with taking the bar exam.

155. Because only Defendant knew the flaws in its software and support systems and exactly how many exam takers planned to upload answers following the Summer 2014 exam, Plaintiff was ignorant of the truth regarding SoftTest and justifiably relied on Defendant's misrepresentations.

156. As a result of Defendant's misrepresentation and Plaintiff's justifiable reliance on it, Plaintiff has suffered damages: she endured the historic failure of Defendant's product and support systems for which they paid substantial sums of money, and suffered stress, anxiety, and emotional distress. To this day, she does not know whether her exam answers were complete and fully uploaded.

NINTH CAUSE OF ACTION
Asserted on Behalf of Plaintiff Only
Breach of Express Warranty

157. Plaintiff incorporates by reference each and every prior and subsequent allegation of this Complaint as if fully restated here.

158. Plaintiff brings a cause of action against ExamSoft for breach of express warranty.

1 159. ExamSoft made numerous representations, descriptions, and promises to Plaintiff
2 regarding the functionality and benefits of ExamSoft and its related technology.

3 160. ExamSoft, however, knew or should have known that its representations, descriptions,
4 and promises regarding SoftTest's functionality were false. ExamSoft was aware of the number of
5 software packages it sold to Plaintiff and other purchasers.

6 161. Plaintiff reasonably relied on ExamSoft's representations in purchasing and using
7 SoftTest. SoftTest, however, did not perform as was warranted. SoftTest was dysfunctional and did not
8 work as advertised, failing to reasonably and timely upload her exam answers, and even literally eating
9 Plaintiff's words as she tried to type her exam answers. Accordingly, ExamSoft breached its express
10 warranty by providing a product containing defects that were never disclosed to the Plaintiff.

11 162. As a direct and proximate result of ExamSoft's false and misleading representations and
12 warranties, Plaintiff suffered significant damages. Accordingly, Plaintiff seeks an order of this Court:
13

- 14 A. Awarding Plaintiff compensatory damages;
- 15 B. Awarding Plaintiff all economic and non-economic damages for the personal injury she
16 sustained while suffering from ExamSoft's failures;
- 17 C. Imposing exemplary/punitive damages against ExamSoft;
- 18 D. Awarding costs and reasonable attorneys' fees; and
- 19 E. Providing for such other relief as set forth below.

20
21
22 **TENTH CAUSE OF ACTION**
23 **Asserted on Behalf of Plaintiff Only**
24 **Breach of Implied Warranty**

25 163. Plaintiff incorporates by reference each and every prior and subsequent allegation of this
26 Complaint as if fully restated here.

27 164. Plaintiff brings a cause of action against ExamSoft for breach of implied warranty.
28

1 165. ExamSoft made numerous representations, descriptions, and promises to Plaintiff
2 regarding the functionality of ExamSoft's SoftTest product and its related technology.

3 166. Plaintiff reasonably relied on ExamSoft's representations in purchasing and employing
4 SoftTest.

5 167. As set forth throughout this Complaint, ExamSoft knew that its representations,
6 descriptions and promises regarding SoftTest were false.

7 168. When Plaintiff purchased SoftTest, it did not conform to the promises or affirmations of
8 fact made in SoftTest's promotional materials, including that the software would provide an "easier,
9 more secure, and more reliable way" to take the bar exam. Instead of reducing stress, the SoftTest
10 product amplified Plaintiff's stress enormously both because it literally ate her words as she typed her
11 exam answers, and because it proved impossible to upload her answers in a timely and reasonable way.

12 169. Accordingly, SoftTest failed to conform to ExamSoft's implied warranty regarding its
13 functionality.

14 170. As a direct and proximate result of ExamSoft's false and misleading representations and
15 warranties, Plaintiff suffered significant injury when ExamSoft made her bar taking experience
16 miserable in every way – from causing inordinate stress and suffering during the upload process after
17 day one, and during the "Pac Man" episode described above, where the software literally ate her words
18 as she struggled to save her work without success. Accordingly, Plaintiff seeks an order of this Court:

19 A. Awarding Plaintiff compensatory damages;

20 B. Awarding Plaintiff economic and non-economic damages for the injury she sustained
21 while using SoftTest;

22 C. Imposing exemplary/punitive damages against ExamSoft;

23 D. Awarding costs and reasonable attorneys' fees; and

24 E. Providing for such other relief as set forth below.
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VIII. REQUEST FOR RELIEF

Plaintiff, individually and on behalf of all others similarly situated, requests judgments against ExamSoft as follows:

A. For an order certifying the Class and Subclass, under Federal Rules of Civil Procedure 23(b)(2) and 23(b)(3), and appointing Plaintiff as representative of the Class and Subclass, and appointing the lawyers and law firm representing Plaintiff as counsel for the Class and Subclass;

B. Declaring ExamSoft's advertising false and misleading;

C. Permanently enjoining ExamSoft from performing further unfair and unlawful acts as alleged herein;

D. For all recoverable compensatory, statutory, and other damages sustained by Plaintiff and Classes, including disgorgement, unjust enrichment, and all other relief allowed under applicable law;

E. Granting Plaintiff and Classes awards of restitution and/or disgorgement of ExamSoft's profits from its unfair and unlawful marketing of its software;

F. For costs;

G. For both pre-judgment and post-judgment interest on any amounts awarded;

H. For appropriate injunctive relief;

I. For treble damages insofar as they are allowed by applicable laws;

J. For appropriate individual relief as request above;

K. For payment of attorneys' fees and expert fees as may be allowable under applicable law;

and

L. For such other and further relief as the Court may deem proper.

IX. JURY TRIAL DEMANDED

Plaintiff hereby demands a trial by jury on all issues so triable.

1 DATED this 7th day of August, 2014.

2 KELLER ROHRBACK L.L.P.

3
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